

ORDER PO-2451

Appeal PA-050023-1

Ministry of Community Safety and Correctional Services

NATURE OF THE APPEAL:

The Ministry of Community Safety and Correctional Services (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to a motor vehicle incident in which the requester was involved. In his request letter, the requester provided detailed information on the accident including the date, the location, the description of the other vehicle, the name of the Ontario Provincial Police (OPP) Officer dispatched to the scene, the Police incident number, and his own contact information. Specifically, the requester sought access to the following:

911 Call

- Transcript of call placed by [requester] to 911
 - Telephone used [phone number]

Truck

- Legal Name of Truck Driver (First, Middle and Last)
 - Permanent Address for Truck Driver
 - Insurance Company and Policy Number
 - Including date of expiration
 - Insured Vehicle, Year, Make, Serial Number
 - Agent/Broker

- Transport Truck Company [named company]
 - Address of Company
 - Insurance Company and Policy Number
 - Including date of expiration
 - Insured Vehicle, Year, Make Serial Number
 - Agent/Broker

- Legal owner on the Truck Cab licensed [license number]
 - Address
 - Insurance Company and Policy Number
 - Including date of expiration
 - Insured Vehicle, Year, Make, Serial Number
 - Agent/Broker

- Legal owner on the Truck Trailer licensed [license number]
 - Address
 - Insurance Company and Policy Number
 - Including date of expiration
 - Insured Vehicle, Year, Make, Serial Number

[Name of OPP Officer]

- Copy of Police (Incident) Report: [a specified number]
- Copy of any notes taken by [name of OPP Officer] on this incident (including police officer notes)

Ontario Provincial Police

- A copy of all records pertaining to Police (Incident) Report: [a specified number] that may or may not be listed above.

The Ministry located twelve pages of responsive records made up of occurrence summaries, police notes and a transcript of a taped comcenter call recorded on a Supplementary Occurrence Report form. The Ministry granted partial access to the records, severing portions on most of the pages. Access to the severed information was denied on the basis that it falls within the exemptions in sections 49(a), taken in conjunction with sections 14(1)(l) and 14(2)(a) (law enforcement), and 49(b), in conjunction with the factor in section 21(2)(f) (highly sensitive information) and the presumption in section 21(3)(b) (compiled as part of a law enforcement investigation). The Ministry also denied access to some portions of the information on the basis that they are non-responsive to the request.

The requester, now the appellant, appealed the Ministry's decision.

During the course of mediation, the Ministry considered the possible application of the "absurd result" principle to specific portions of the records and decided to reconsider its decision on access. The Ministry issued a supplementary decision letter granting total access to pages 6 and 7 of the record entitled "Transcript of Taped Comcentre Call". The appellant was satisfied with this decision and these pages of the records are no longer at issue in this appeal.

Also during mediation, the mediator advised the appellant that the records do not contain the name of the owner of the cab and trailer, only information about the driver. Subsequently, the mediator contacted the driver whose rights might be affected by the disclosure of the records (the affected person) to seek his views on the disclosure of his personal information to the appellant. The affected person objected to the disclosure of his personal information.

The appellant subsequently confirmed that he is only seeking access to the information relating to the other driver, the affected party, and that he does not seek access to the non-responsive information or to the information for which the Ministry claimed the law enforcement exemption. As a result, pages 4, 5, 8, 9, 10, 11 and 12 are no longer at issue in this appeal. Accordingly, only the severed portions of pages 1, 2 and 3, for which the discretionary invasion of privacy exemption at section 49(b) has been claimed, are at issue.

As further mediation was not successful, the appeal was transferred to me for adjudication.

I sent a Notice of Inquiry to the Ministry, initially, and received representations in return. I also sent a copy of the Notice to the affected party whose information is being sought, inviting him to submit representations. The affected party declined to submit representations and advised this office by telephone that he did not wish to be contacted further about this appeal.

I then sent a copy of the Notice of Inquiry to the appellant, along with a complete copy of the Ministry's representations. The appellant provided representations in response. As the

appellant's representations raised issues to which I felt that the Ministry should have an opportunity to reply, I sent the appellant's representations to the Ministry and it provided reply representations.

RECORDS:

The information that remains at issue is contained on three pages of responsive records numbered 1, 2, and 3.

- Page 1 is a computer print out of information related to the motor vehicle accident and includes the names, dates of birth, sex, addresses and telephone numbers of both the appellant and the affected party.
- Page 2 is a document entitled "Occurrence Summary" and also details the names, dates of birth, sex, addresses and telephone numbers of both the appellant and the affected party.
- Page 3 is a copy of one page of Police Officer's note book, in which the officer who attended the accident scene recorded information including the names, addresses, birth dates, and telephone numbers of both the appellant and the affected party.

The Ministry has disclosed to the appellant the information that relates to him while the information that has been severed and that remains at issue relates to the affected party.

DISCUSSION:

Personal information

In order to determine whether section 49(b) of the *Act* applies in to exclude the information from disclosure, it is first necessary to establish whether the information at issue contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except where they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

The Police submit that the information remaining at issue contains the types of personal information listed in paragraph's (a), (d) and (h) of the section 2(1) definition of "personal information." The Police submit that this information belongs to the affected person.

The appellant takes the position that the information at issue does not fall under the "personal information" definition but is rather information about an individual in business capacity:

[B]eing a truck driver is a profession and [named truck company] operates as a company. As stated in the Notice of Inquiry on page 5, "As a general rule information associated with an individual in a professional, official or business capacity will not be considered "about the individual".

The appellant is correct that previous decisions of this office have drawn a distinction between an individual's personal, and professional or official government capacity, and found that in some circumstances, information associated with a person in his or her professional or business capacity will not be considered to be "about the individual" within the meaning of section 2(1) definition of "personal information" [Orders P-257, P-427, P-1412, P-1621]. However, in my view, this distinction cannot be made in the circumstances of this appeal. From my review of the records, I find that information that has been severed from the records at issue consists of the

personal information of an identifiable individual, namely, the affected party. The personal information includes his age and sex (paragraph (a)), address and telephone number (paragraph (d)), as well the individual's name along with other personal information relating to him (paragraph (h)). I do not agree that the information at issue qualifies as the affected party's business information as it is inherently personal and does not specifically arise from or relate to his employment. The personal information is strictly speaking, "about" this individual.

The records at issue also contain the personal information of the appellant including, his age and sex (paragraph (a)), address and telephone number (paragraph (d)), as well as the individual's name along with other personal information relating to him (paragraph (h)). I note however that the appellant has been granted access to those portions of the records that contain his own personal information. All of the personal information that remains at issue relates to the affected party.

Previous orders have established that if a record contains the personal information of a requester, a decision regarding access must be made in accordance with the exemption at 21(1) of Part II of the *Act* [Orders M-352 and MO-1757-I]. However, in circumstances where a record contains both the personal information of the appellant and another individual, the request falls under Part III of the *Act* and the relevant personal privacy exemption is the exemption at section 49(b) [Order M-352]. Some exemptions, including the invasion of privacy exemption at section 21(1) are mandatory under Part II but discretionary under Part III, and thus, in the latter case, an institution may disclose information that it could not disclose if Part II applied [Order MO-1757-I].

Furthermore, the correct approach is to review the entire record, not only the portions remaining at issue, to determine whether it contains the requester's personal information. This record-by-record analysis is significant because it determines whether the record as a whole (rather than only certain portions of it) must be reviewed under Part II or Part III of the *Act* [Order M-352].

Accordingly, as I have found that the records at issue in this appeal contain the personal information of both the appellant and the affected party, I must review whether the information remaining at issue qualifies for exemption under the discretionary exemption at section 49(b) of Part III of the *Act*.

DISCRETION TO REFUSE REQUESTER'S OWN PERSONAL INFORMATION/ INVASION OF PRIVACY

General principles

Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right. Section 49(b) is one of those exceptions and reads as follows:

49. A head may refuse to disclose to the individual to whom the information relates personal information,

- (b) where the disclosure would constitute an unjustified invasion of another individual's personal privacy;

Under section 49(b), where a record contains the personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution has the discretion to refuse to disclose that information to the requester. In my discussion on personal information I found that the records at issue contain both the information of the appellant (the requester) and the affected party. I will therefore consider whether the disclosure of the personal information in the records would be an unjustified invasion of the personal privacy of other individuals and is exempt from disclosure under section 49(b).

If the information falls within the scope of section 49(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy.

On appeal, an analysis under section 49(b) requires that I must be satisfied that disclosure of the information at issue *would* result in an unjustified invasion of the personal privacy of the other individual (the individual to whom the information relates) [Order M-1146]. Sections 21(2) (3) and (4) provide guidance in determining whether the "unjustified invasion of privacy threshold is met".

Section 21(2) lists criteria for the institution to consider in making a determination as to whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 21(3) lists the types of information the disclosure of which is *presumed* constitute and unjustified invasion of personal privacy. Section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

If none of the presumptions in section 21(3) applies, the institution must consider the application of the factors listed in section 21(2), as well as other considerations that are relevant in the circumstances of the case.

If a presumption listed in section 21(3) has been established, it cannot be rebutted by either one or a combination of the factors set out in section 21(2). A presumption can, however, be overcome if the personal information is found to fall under section 21(4) of the *Act* or if a finding is made under section 16 of the *Act* that a compelling public interest exists in the disclosure of the record that clearly outweighs the purpose of the section 21 exemption [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

Unjustified invasion of another individual's personal privacy

Representations

In the present appeal, the Ministry relies on the presumption in section 21(3)(b) and accordingly, takes the position that disclosure of that information would result in a presumed unjustified invasion of personal privacy of the affected party. That section reads:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information, was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation.

The Ministry submits:

The Ministry is of the opinion that the personal information remaining at issue consists of highly sensitive personal information that was compiled and is identifiable as part of an OPP investigation into a possible violation of law. The OPP is an agency that has the function of enforcing the laws of Canada and the Province of Ontario. The *Police Services Act* provides for the composition authority and jurisdiction of the OPP. Some of the duties of a police officer include investigating possible law violations, crime prevention and apprehending criminals and others who may lawfully be taken into custody.

The exempt information in part documents the law enforcement investigation undertaken by the OPP in response to the motor vehicle accident involving the appellant and the affected party. The Ministry submits that the exempt personal information was compiled and is identifiable as part of an investigation into a possible violation of law. The circumstances of the motor vehicle accidents in some instances can result in charges being laid under the *Criminal Code* or the *Highway Traffic Act*.

In Order PO-1728, Senior Adjudicator David Goodis considered whether certain personal information collected by the police during the course of a motor vehicle accident investigation was subject to the presumption contained in section 21(3)(b) Senior Adjudicator Goodis commented:

Although the appellant seeks only the affected person's name, in the circumstances, that information clearly was compiled and is identifiable as part of an investigation into a possible violation of law, in this case section 128 of the *Highway Traffic Act*. Therefore, the section 21(3)(b) presumption of an unjustified invasion of personal privacy applies to the requested information.

The Ministry submits that the application of section 21(3)(b) of the [Act] is not dependant on whether charges are actually laid (Orders P-223, P-237 and P-1225).

The Ministry submits that none of the circumstances outlined in section 21(4) of the [Act] would operate to rebut the presumption of an unjustified invasion of personal privacy that has been established under section 21(3)(b) of the [Act].

The Ministry also submits that there is no compelling public interest in the disclosure of the exempt personal information contained in section 21(1).

The appellant makes no specific representations on the application of section 21(3)(b).

Findings

Based on the submissions of the Ministry, my review of the information at issue in the records, and a long line of orders issued by this office dealing with similar information, I agree with the Ministry that the personal information contained in the record was compiled and is identifiable as part of an investigation into a possible violation of law, specifically a breach of the *Highway Traffic Act*. The fact that quasi-criminal proceedings were not commenced does not have a bearing on the issue since section 21(3)(b) only requires that there be an investigation into a possible violation of law [Order PO-1849]. Accordingly, I find that the personal information at issue falls within the ambit of the presumption in section 21(3)(b) of the *Act*.

As I have found that the section 21(3)(b) presumption of an unjustified invasion of personal privacy applies, it is not necessary for me to determine whether section 21(2)(f), relied upon by the Ministry in its decision, is a relevant factor weighing against the disclosure of the information or whether any of the other sections in 21(2) weighing in favour of disclosure might apply in the circumstances of this appeal. As noted above, the only way such a presumption can be rebutted is if sections 21(4) or 23 (the public interest override) apply. The factors in section 21(2) cannot be used to rebut the presumptions in section 21(3). As none of the information at issue falls within section 21(4) and the appellant has not raised the application of section 23, subject to the Ministry's proper exercise of discretion and my discussion of the "absurd result" principle below, the requirements of the section 21(3)(b) presumption have been established and disclosure of the personal information is deemed to constitute an unjustified invasion of the personal privacy of the affected party.

EXERCISE OF DISCRETION UNDER SECTION 49(b):

As indicated above, section 49(b) is a discretionary exemption and permits the Ministry to disclose information despite the fact that it could be withheld. This involves balancing of interests between the appellant's right of access to his own personal information and the affected party's right to protection of his privacy. On appeal, this office may review the decision taken by the Ministry, in order to determine whether it erred in doing so [Orders PO-2129-F and MO-1629].

In its representations, the Ministry submits that it has properly exercised its discretion in respect of the appellant's request:

The Ministry is mindful of the major purposes and objectives of the [Act]. The Ministry considers each request for access to information on an individual, case by case basis. In the circumstances of the appellant's request, the Ministry has exercised its discretion to release a substantial portion of the requested information to the appellant. It should be noted that the Ministry has issued 2 decision letters to the appellant.

The Ministry carefully weighed the appellant's right of access to records that contain his personal information against affected party's rights to privacy protection. The Ministry considered the potential benefits to the appellant should the withheld information be released. The Ministry is aware of the possibility that the records requested by the appellant may be in relation to future legal issues arising from the September 28, 2004 motor vehicle accident.

Given the highly sensitive nature of the motor vehicle accident that resulted in the creation of the responsive records, the Ministry was satisfied that release of additional information would cause personal distress to the affected party. The Ministry was also satisfied that the information remaining at issue is subject to the presumption contained in section 21(3)(b) for information compiled and identifiable as part of an investigation into a possible violation of law.

The Ministry is aware that the information remaining at issue relates to a matter that was investigated by the OPP in the relatively recent past. The motor vehicle accident occurred less than 1 year ago.

The exempt information primarily relates to the affected party who has not provided the Ministry with consent to disclose personal information he provided to the OPP.

The Ministry in its exercise of discretion determined that release of the withheld information was not appropriate in the particular circumstances of the appellant's request.

The appellant does not offer any submissions on this issue.

I have considered the representations of the Ministry and the contents of the records carefully. In the circumstances, I find nothing in the manner which the Ministry exercised their discretion that would warrant my review. I therefore find that, subject to my discussion of the "absurd result" principle below, the Ministry has properly exercised its discretion under section 49(b) not to disclose the remaining portions of the records to the appellant, in accordance with the Act.

ABSURD RESULT:

In his representations, the appellant states that he has already been provided with information about the affected party, including his name, birth date, address, telephone number, driver's licence, vehicle plate number, operator and the operator's address. The appellant also knows the sex of the affected party. The fact that the appellant already has access to much of the information at issue appears, at first glance, to give rise to the possible application of the "absurd result" principle.

In its reply representations, the Ministry takes the position that "the fact that parties to a matter may have access to information through some other process does not mean that such information will also be released in response to a [request made under the *Act*]". The Ministry explains:

The Ministry receives many Freedom of Information and Protection of Privacy Act [the *Act*] requests from individuals who have been involved in motor vehicle accidents. It is not uncommon for a requester, such as the appellant, who is an involved driver, to already possess personal and other information relating to the motor vehicle accident. In many instances, similar information may also be contained in ministry records (e.g. officer's notes). Where a [request under the *Act*] has been submitted for such information and the necessary application fee has been paid, the request is processed according to the access provisions of the [Act].

This office has applied the "absurd result" principle in situations where the basis for finding that information qualifies for exemption under section 21(1) would be absurd and inconsistent with the purpose of the exemption.

Senior Adjudicator John Higgins first applied the "absurd result" principle in Order M-444 when addressing the application of the municipal equivalent of section 21(3)(b). In Order M-444 Adjudicator Higgins stated:

Turning to the presumption in section 14(3)(b), the evidence shows that the undisclosed information was compiled and is identifiable as part of an investigation into a possible violation of law (namely, a murder investigation) and for that reason, it might be expected that the presumption in section 14(3)(b) would apply.

However, it is an established principle of statutory interpretation that an absurd result, or one which contradicts the purposes of the statute in which it is found, is not a proper implementation of the legislature's intention. In this case, applying the presumption to deny access to information which the appellant provided to the Police in the first place is, in my view, a manifestly absurd result. Moreover, one of the primary purposes of the *Act* is to allow individuals to have access to records containing their own personal information, unless there is a compelling reason for

non-disclosure. In my view, in the circumstances of this appeal, non-disclosure of this information would contradict this primary purpose.

It is possible that, in some case, the circumstances would dictate that this presumption should apply to information which was supplied by the requester to a government organization. However, in my view, this is not such a case.

Accordingly, for the reasons enumerated above, I find that the presumption in section 14(3)(b) does not apply. In the absence of any factors favouring non-disclosure, I find that the exemption in section 38(b) does not apply to the information at issue in the records.

Order M-444 made it clear that if an individual makes a formal request for access under the *Act* to his or her statement made as a witness to a police investigation, that statement will be provided to the requester, regardless of the fact that it contains personal information of other individuals. Several subsequent orders have supported this position and include similar findings [see Orders M-451, M-613, M-1077, and P-1263]. The reasoning established by these orders is that non-disclosure of personal information which was originally provided to an institution by an appellant would contradict one of the primary purposes of the *Act*, which is to allow individuals to have access to records containing their own personal information unless there is a compelling reason for non-disclosure. They determined that applying the presumption to deny access in these circumstances would, according to the rules of statutory interpretation, lead to an absurd result.

The “absurd result” principle was later found to be equally applicable where:

- The requester was present when the information was provided to the institution [Orders P-1414].
- The information is clearly within the requester’s knowledge, such as where the requester already had a copy of the record or where the requester was the intended recipient of the record [Orders MO-1196, PO-1679, MO-1755].

In Order PO-1679, former Assistant Commissioner Tom Mitchinson found that an appellant had a right of access to an original winning lottery ticket held by the Ontario Lottery Corporation which he co-owned with the affected person. The lottery ticket included the name, address, telephone number and signature of the person who claimed the prize and that individual had objected to the disclosure of his personal information. Assistant Commissioner Mitchinson stated:

In my view, denying the appellant the right to view the original lottery ticket which he co-owns with the affected person, would similarly lead to an absurd result in the present circumstances. The appellant has a photocopy of the record, and is clearly aware of its contents. Any personal information of the affected party that is contained in the record is known to the appellant, and any

information concerning the affected person's "finances", "income" or "financial activities" associated with her share of the ownership of the ticket have been communicated to the appellant, and to the public, through the Court process that determined the ownership issue.

For these reasons, I find that section 21(3)(f) is not applicable in the circumstances of this appeal.

In the current appeal, based on information supplied by the appellant with his representations, the majority of the information at issue in this appeal is already clearly within the requester's knowledge as it was provided to him by an officer at an OPP detachment. In my view, denying him access to the information would lead to an absurd result. Accordingly, I find that the appellant should be granted access to a copy of the records in which the affected party's name, involvement in the incident, sex, address, and telephone number appears. With respect to the affected party's birth date, there is a discrepancy in the recorded birth date of the affected party. A birth date is recorded in pages 1 and 2 and an entirely different birth date is recorded on page 3, the police officer's notes. The appellant has already been provided with the birth date which appears in the police notes on page 3 therefore, that information should be disclosed to him. However, the birth date as it appears on pages 1 and 2 of the records should be severed because the appellant has not been provided with that specific date and it is therefore, not within his knowledge.

Consequently, I find that the "absurd result" principle applies and the portions of the record that are already known to the appellant should be disclosed to him.

ORDER:

1. I order the Ministry to disclose to the appellant the portions of the records that are already known to him no later than **March 29, 2006**, but not before **March 24, 2006**. For clarity, I have provided the Ministry with a highlighted version of the records identifying the portions that should NOT be disclosed.
2. I order to verify compliance with this order I reserve the right to require the Ministry to provide me with a copy of the records disclosed to the appellant pursuant to Provision 1, upon my request.

Original Signed By
Catherine Corban
Adjudicator

February 22, 2006